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1 TO THE HONORABLE KEVIN R. HUENNEKENS AND TO ALL PARTIES OF
2 INTEREST:

3 Collectively the California Taxing Authorities Los Angeles,
4 Monterey, Riverside and San Bernardino Counties, California hereby
5 respond to the Liquidating Trustee's 18th Objection to Claims filed by
6 Taxing Authorities.

7 At issue are post petition taxes due to various Taxing
8 Authorities as described in detail below.

9 Los Angeles, Monterey and San Bernardino were subject to the 27th
10 Omnibus Objection filed by Debtors' prior to plan confirmation as well
11 as the 37th Omnibus Objection and Summary Judgment motions against Los
12 Angeles and Monterey.

13 The response is based on the following grounds:

- 14 1. This court should use its discretion to abstain for hearing
15 matters relating to reduction or expungement of local tax
16 claims;
- 17 2. The court should abstain because Debtors have totally and
18 wholly failed to state any substantive basis or submit any
19 evidence that the claims of the Taxing Authorities should
20 be reduced or expunged;
- 21 3. The court should abstain as to those Taxing Authorities
22 in which an assessment appeal was already filed for 2009
23 (see chart below - ie Los Angeles and Monterey)
- 24 4. The bankruptcy code specifically prohibits the local tax
25 claims from being redetermined because the time to
26 contest the tax has expired. As to Riverside and to San
27 Bernardino, no assessment appeals were filed. The time
28 to contest was November 30, 2009. That time period has

1 long expired.

2 **I. INTRODUCTION.**

3 The Taxing Authorities are a political subdivision of the
4 State of California which possesses the authority under the laws of
5 the State to assess and collect ad valorem taxes on real and
6 personal property. The taxes at issue in this case are personal
7 property taxes.

8 The subject property was comprised of business locations in
9 the various California Counties. The business property at these
10 locations was subject to the assessment of local property taxes
11 under California State law.

12 The Debtors were entities doing business in California,
13 required to file annual Business Personal Property Statements and
14 to pay taxes due with respect to personal property held in
15 California. The taxing authorities assessed the debtor's personal
16 property per the California statutes, using information
17 substantially provided by the debtors.

18 In fact, in California, the debtors are required to submit a
19 Business Personal Property Statement, the 571L Property Statement,
20 under penalty of perjury, which sets forth the personal property
21 owned by the debtor during any particular tax year. The resulting
22 tax is determined by the information and values provided by the
23 property of the business equipment reported.

24 The California Taxing Authorities rely on tax revenue in order
25 to provide funding for local fire, police, schools and hospitals.

26 All personal property tax claims are secured against the
27 property claimed. The amounts below continue to be subject to
28 ongoing interest under California State Law, 11 USC Section 506 and

1 511. The claims are as follows:

2
3 Los Angeles (2009-10 tax year) Assessment Appeal
Filed?

4	1. 40711740 \$ 19,228.48	Yes
	2. 40776226 \$ 16,394.64	Yes
5	3. 40811362 \$ 3,535.35	Yes
	4. 40811363 \$ 8,078.54	Yes
6	5. 40811364 \$ 7,881.32	Yes
	6. 40811365 \$ 5,079.95	Yes
7	7. 40811366 \$ 5,379.53	Yes
	8. 40811367 \$ 9,683.01	Yes
8	9. 40811368 \$ 6,873.44	Yes
	10. 40811369 \$ 8,589.15	Yes
9	11. 40811370 \$ 7,653.25	Yes
	12. 40811371 \$ 2,140.66	Yes
10	13. 40811372 \$ 8,003.55	Yes
	14. 40811373 \$ 7,075.12	Yes
11	15. 40811374 \$ 5,273.84	Yes
	16. 40811375 \$ 2,873.99	Yes
12	17. 40811376 \$ 4,163.39	Yes
	18. 40811377 \$ 6,764.02	Yes
13	19. 40811378 \$ 6,997.44	Yes
	20. 40811379 \$ 8,495.52	Yes
14	21. 40811380 \$ 9,412.23	Yes
	22. 40807640 \$ 8,035.58	No
15	Total: \$ 167,612.00	

16 Note all the appeals were heard 4/25/11 and continued to a
17 future date not yet scheduled.

18 Monterey

19	1. 800-013-800 \$27,663.41	Yes	withdrawn
	Fiscal tax Year 2009		
20	2. 985-000-074 \$ 6,528.36	No	
21	Fiscal tax year 2007,	appeal deadline	
	bill issued 6/08 due 12/1/08	was 8/16/08	
22	Post petition		
23	3. 800-021-144 \$ 5,472.82		
24	Fiscal tax year 2009	No ¹	

25 **Total \$ 39,664.59**

26
27
28 ¹Since an appeal was filed for the other 2009 assessment, and
this bill was apparently uncontested, this bill should just be paid
as undisputed.

1 The Debtors have failed to pay these taxes as required by
2 28USC § 960(b):

3 A tax under subsection (a) shall be paid on or before the due
4 date of the tax under applicable non-bankruptcy law unless (1)
5 the tax is a property tax secured by a lien against property
6 that is abandoned...or (2) payment of the tax is excused under a
7 specific provision of Title 11.

8 **II. PERSONAL PROPERTY TAX ASSESSMENTS ARE**

9 **MANDATED UNDER CALIFORNIA LAW.**

10 California State Law mandates that personal property must be
11 subject to taxation. Under California State law the Tax Collector
12 shall collect taxes on all personal property. California Revenue and
13 Taxation Code Section 2903. Under California state law, every piece
14 of personal property is subject to taxation.² California Revenue
15 and Taxation Code section 401 states: "Every assessor shall assess
16 all property subject to general property taxation at its full
17 value." Under California state law, personal property is to be
18 assessed at 100% of fair market value each year.³

19 California Revenue and Taxation Code Section 401.3 provides
20 that: "The assessor shall assess all property subject to general
21

22
23 ² California Revenue and Taxation Code section 106 states:
24 "'Personal property' includes all property except real estate."

25 ³In California, property tax assessments consist of two
26 components. The first component is the assessed value. The second
27 is the tax rate. The latter is applied against the former to
28 calculate the amount of taxes due. This equation is sometimes known
as the tax ratio.

For taxable personal property, the assessed value is determine
annually at 100% of fair market value.

The tax rate for personal property is one percent (1%) California
Constitution Article XIII section 12.

1 property taxation on the lien date as provided in Articles XIII and
2 XIII A of the Constitution. . . ."

3 Personal property taxes are assessed as of January 1 ("lien
4 date") of the year in which taxes become due.⁴ California Revenue
5 and Taxation Code Sections 2901, 117 and 2192. More importantly the
6 obligation to pay California personal property taxes fixes on the
7 lien date for which the tax is due. The lien date for the 2009-10
8 fiscal tax year was January 1, 2009.

9
10 If a taxpayers owns any property on the lien date, liability
11 affixes even if the taxpayer nor longer owns, controls or possesses
12 the property. The objection admits on page 5, paragraph 11 that the
13 debtor was still operating in 2009. Western States Wire Corp. 490
14 F2d 1065 (9th Cir. 1974).

15 Personal property taxes are due July 31st of each year and last
16 due without interest on August 31st of each year. California Revenue
17 and Taxation Code Section 2922.

18
19 In conclusion, regardless if stores were closed in March of
20 2009 or thereafter, the debtors admitted it still owned personal
21 property as of California's January 1, 2009 lien date and under
22 California law is still liable for the resulting tax.

23
24 ⁴ California Revenue and Taxation Code, section 117 states: "Lien
25 date is the time when taxes for any fiscal year become a lien on the
26 property." California Revenue and Taxation Code Section 118 defines
assessment year as "the period beginning with a lien date and ending
immediately prior to the succeeding lien date for taxes levied by the
same agency."

27 Revenue and Taxation Code section 2192 states:" . . . all tax liens
28 attach annually as of 12:01 a.m. on the first day of January preceding
the fiscal year for which the taxes are levied..."

1 **III. THIS COURT SHOULD USE ITS DISCRETION TO ABSTAIN UNDER**
2
3 **SECTION 1334(c) .**

4 This court should abstain from reducing and or expunging the
5 local taxes. Section 1334(c), which confers original, but not
6 exclusive jurisdiction, on the United States Bankruptcy Court for
7 civil proceedings arising under Title 11 or arising in or related to
8 cases under Title 11 also provides that:

9 Nothing in this section prevents a district court in the
10 interest of justice or in the interest of comity with State
11 courts or respect for State Law from abstaining from hearing a
12 particular proceeding arising under title 11 or arising in or
13 related to a case under title 11. 28 U.S.C. §1334(c)(1).

14 In Ohio ex rel Fisher v. Forster (In Re Forster), 146 B.R. 383,
15 386 (Bank. N. D. Ohio 1992), the court held that under §1334(c)(1),
16 a bankruptcy court should, in its own discretion, abstain from
17 adjudicating a removed action in the interest of comity and respect
18 for state Law when the action involves interpretation of state
19 environmental legislation since it is without expertise on such
20 issues.

21 The court noted that,

22 Even if this court were not compelled by 28 U.S.C. §1334 (c)(2)
23 to abstain from hearing the Debtor's adversary proceeding
24 against (defendant), it would be guided by principles of comity
25 to respect a pending unresolved state Law suit and would not
26 exercise federal judicial authority in the disregard of the
27 comity between the state courts and the federal courts. Id., p.
28 386.

29 The court went on to note,

30 Federal courts should be hesitant to exercise jurisdiction when
31 state issues substantially predominate, whether in terms of
32 proof, or the scope of the issues raised, or of the
33 comprehensiveness of the remedy sought. Id., p. 386, citing
34 In re White Motor Credit, 761 F.2d 270 (6th Cir. 1985).

1 In Forster, the plaintiff claimed that the Debtor violated
2 certain environmental regulations in operating a landfill and that
3 the complaint was based upon Ohio administrative codes. The Court
4 held that these actions were based upon state Law causes of action.
5 Id., p. 385-86. Forster applies directly to the case at hand.

6 Federal courts exercising bankruptcy jurisdiction should defer
7 to a state court for determination of a particularly unusual
8 question of state Law. Coker v. Pan American World Airways, Inc.
9 (In re Pan American Corp.), 950 F.2d 839 (2nd Cir. 1991).

10
11 In Dart & Boclue Co. v. Slosberg (In re Dart & Bogue Co.), 52
12 B.R. 594 (Bank. D. Conn. 1985), the trustee brought a proceeding
13 under §544, seeking a determination that pre-petition mortgage deeds
14 executed by the Debtor were invalid under Connecticut Law. On
15 Motion for Summary Judgment, the court held that abstention was
16 appropriate with respect to unsettled questions of State Law on the
17 validity of mortgages which did not state the maximum term of notes
18 for which the mortgages were security. The Court abstained because
19 the proceeding concerned a state statute and unsettled state law
20 controlled the resolution of the issue in the bankruptcy proceeding.
21 The Court found the state court should decide the issue.

22
23 In a very similar case, In re Metromedia Fiber Network, Inc.,
24 299 B.R. 251 (Bankr. S.D.N.Y. 2003), the court held permissive
25 abstention was appropriate because, "[a]d valorem property taxation
26 is governed by local Law, and there is compelling local interest in
27
28

1 'uniformity of assessment' in fairly allocating the local tax
2 burden." Id., 299 B.R. at 284.⁵

3 Likewise in In re Cable and Wireless, USA., 331 B.R. 568
4 (bankr. D. Del. 2005) the court abstained because of the variations
5 among the taxing authorities.

6 Additionally, this court should abstain because the taxes are
7 currently subject to the local assessment appeal process. In Los
8 Angeles for example, all the appeals were heard 4/25/11 and
9 continued to a future date not yet scheduled. In Monterey, the
10 assessment appeal was set for November 18, 2010, however, no
11 representatives from Circuit City appeared to pursue the hearing.

12 The bankruptcy court should abstain.

13
14 **IV. THE COURT SHOULD ALSO ABSTAIN BECAUSE THE DEBTORS FAILED TO**
15 **SUBMIT EVIDENCE WHICH WOULD RESULT IN THE DISALLOWANCE OF THE**
16 **CLAIMS.**
17

18 When a party objects substantively to a proof of claim, that
19 party must identify the statutory basis for disallowance under 11
20 U.S.C. §502(a), and submit admissible evidence to establish facts

21
22 ⁵ The court in In re Millsaps, 133 B.R. 547 (Bankr.M.D.Fla. 1991),
23 addressed another policy consideration supporting abstention under 28
24 U.S.C. §1334(c)(1), "the interest of justice", where a debtor sought
a refund of federal income taxes paid:

25 Unless this court abstains in these unusual circumstances, every
26 taxpayer would know that he or she could ignore all of the tax
27 protest and determination procedures ... allow all time periods
28 they provide to expire, ... and then years later come into this
court and obtain the judicial determination the taxpayer chose
not to seek before. The interest of justice cannot be furthered
by that result. Id. at 555.

1 proving each ground for disallowance alleged. See Hon. Kathleen P.
2 March and Rigoberto V. Obregon, Objecting to Claims: The Downfall
3 of Five Great Bankruptcy Myths, 18 Cal. Bankr. J. 299, 305 (1990).

4 When a proof of claim is properly filed, the prima facie
5 presumption as to validity and amount pursuant to Rule 3001(f) is
6 triggered.

7
8 Thereafter, the objecting party must refute this prima facie
9 presumption by submitting countervailing evidence of a probative
10 force equal to that of the allegations of the creditor's proof of
11 claim in order to overcome this presumption. 4-502 Collier On
12 Bankruptcy (15th ed. Revised 2006).

13 The debtors have failed to submit any admissible evidence to
14 establish facts proving that the claim should be reduced. Further,
15 the debtors did not obtain any of the documents upon which the
16 Assessor used to ascertain the value. Neither did it point out where
17 the Assessor made errors.

18 Therefore, the debtors have not rebutted the prima facie
19 presumption of validity of the claim. The debtors substantive
20 objections cannot be sustained.

21
22 _____ In In re AWB Associated, G.P., 144 B.R. 270 (Bankr. E. D. PA.
23 1992), the facts are similar. AWB failed to provide any evidence on
24 the value of the real property it was seeking to challenge. Rather
25 AWB simply made conclusionary statements absent evidence that the
26 property had declined in value. The Court criticized AWB for
27 failing to submit any evidence on its challenge.

28 The AWB court stated:

1 Firstly, AWB failed to overcome the presumption of correctness
2 of Camden's tax assessments. In order to achieve such a
3 result, AWB was obliged to first introduce Camden's valuation
4 of the property and then offer competent testimony which
5 contradicted that valuation. Id. at 279-80.

6 of this subsection, the court may determine the amount or legality
7 of any tax, any fine, or penalty relating to a tax, or any addition
8 to tax, whether or not previously assessed, whether or not paid and
9 whether or not contested before and adjudicated by a judicial or
10 administrative tribunal of competent jurisdiction.

11 Specifically with respect to the request to reduce the claim of
12 San Bernardino at page 69, Riverside and page 71 there is no
13 evidence submitted by the liquidating trustee that gives legal
14 authority for reduction.

15 Additionally, there was no evidence submitted why Monterey's
16 claim at page 79 should be expunged. Neither was there any evidence
17 submitted to indicate why the claim of Los Angeles should be
18 secured. The reason give was that a priority was given to the
19 penalty so the claim should be reduced to unsecured. 11 USC Section
20 506(b) allows a secured claim to incur costs, fees and charges.
21 This section is broad enough to include late charges.

22 The court should not reduce or expunge the claims.

23 **V. THIS COURT SHOULD FURTHER ABSTAIN BECAUSE THE DEBTORS FILED**
24 **AN ASSESSMENT APPEAL.**

25 As stated above the court should further abstain as to Los
26 Angeles and Monterey because the debtors timely filed assessment
27 appeals for the 2009 year. As noted above, the only appeals not
28

1 filed were to the 2007 Monterey bill and the 4080760 bill for Los
2 Angeles. The Los Angeles appeal hearings are still pending and
3 Circuit City failed to show up at the Monterey appeal hearing.

4 California State Law limits the time debtors can challenge the
5 value. An appeal to challenge the current value must be filed
6 between July 2nd and September 15th with the County Board of
7 Equalization.⁶ Note the time can be extend to November 30th of any
8 given year.
9

10 With regard to the 2007 ad valorem tax bill in Monterey the
11 time to challenge was August 16, 2008 for the 2007 taxes. This time
12 period has long expired.

13 In order to recover taxes, a taxpayer must meet two specific
14 conditions: a timely assessment appeal before the local assessment
15 appeals board⁷ and the timely filing of a claim for refund of taxes
16 with the county's Board of Supervisors. Both requirements are
17 jurisdictional.
18

19 "It is not a matter of judicial discretion, but is a
20 fundamental rule of procedure . . . exhaustion of the administrative
21 remedy is a jurisdictional prerequisite to resort to the courts."
22

23 ⁶ California Revenue and Taxation Code section 1603 states:
24 (a) A reduction in an assessment on the local roll shall not be made
25 unless the party affected or his or her agent makes and files with the
26 county board a verified, written application showing the facts claimed
27 to require the reduction and the applicant's opinion of the full value
28 of the property. The form for the application shall be prescribed by
the State Board of Equalization.
(b) The application shall be filed within the time period beginning
July 2 and continuing through and including September 15.

1 Albelleira v. District Court of Appeal, 17 Cal. 2d 280, 293, 109
2 P.2d 942 (1941). See United States v. Superior Court, 19 Cal. 2d
3 189, 194, 120 P.2d 26 (1941) - "Jurisdiction to entertain an action
4 for judicial relief is conditioned upon a completion of the
5 administrative procedure."

6 "[T]he right to a refund of taxes is purely statutory. . . ."
7
8 Osco Drug, Inc. v. County of Orange, 221 Cal. App., 3d 189, 195, 272
9 Cal. Rptr. 14 (1990) and Chrysler Credit Corp. v. Ostly, 42 Cal.
10 App. 3d 663, 680, 117 Cal. Rptr. 167 (1974).

11 **VI. 11 U.S.C. SECTION 505(A) (C) SPECIFICALLY STATES NO DETERMINATION**
12 **OF TAX LIABILITY CAN OCCUR IF THE APPLICABLE PERIOD FOR CONTESTING**
13 **OR REDETERMINING THAT AMOUNT UNDER ANY LAW HAS EXPIRED.**

14 New section (a) (C) to Section 505 specifically states that if
15 the period for contesting or redetermining the amount under any
16 state law has expired, the debtor cannot seek redetermination of the
17 tax. Again, in Los Angeles the assessment appeals are still
18 pending, Monterey, the appeal went forward but debtor failed to
19 appear, no appeals were filed in Riverside or San Bernardino and the
20 appeal period ended November 20, 2009.

21
22 Neither is 11 USC Section 108 applicable to extend the
23 applicable state time period to file appeals in those counties where
24 not appeal was filed. Section 108(a) is specifically limited to
25 those actions filed prior to the bankruptcy petition date. Collier
26 on Bankruptcy, 15 Ed Rev. p. 108.2. Thus, this section in
27 inapplicable to the 2009 appeals filed in Los Angeles and Monterey
28

1 and in general to post petition tax liability. The debtors
2 voluntarily filed assessment appeals post petition. Village at
3 Oakwell Farms, Ltd. 428 B.R. 372 (Bankr. W.. Tex 2010)

4
5 **VII. CONCLUSION.**

6 The California Taxing Authorities respectfully request that the
7 court deny this motion based on the foregoing.

8 Dated: May 5, 2011

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9
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